STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PADRO FLOYD,

Defendant-Appellant.

UNPUBLISHED
October 28, 2003

No. 240840
Wayne Circuit Court
LC No. 01-008228-01

Before: Bandstra, P.J., and Hoekstra and Borrello, JJ.

PER CURIAM.

Defendant was charged with armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a nonjury trial, he was convicted of assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, and felony-firearm. He was later sentenced to concurrent prison terms of nine to twenty-four years and two to five years on the assault and weapons offenses, respectively, to be served consecutively to the mandatory two-year term for felony-firearm. Defendant appeals as of right and we affirm.

Defendant first contends the evidence was insufficient to sustain the verdict of assault with intent to rob while armed.

A challenge to the sufficiency of the evidence in a bench trial is reviewed de novo on appeal. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39; 642 NW2d 339 (2002). This Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). The trial court's factual findings are reviewed for clear error. A finding of fact is considered "clearly erroneous if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

The elements of the crime are (1) an assault with force or violence, (2) an intent to rob and steal, and (3) the defendant is armed. *People v Smith*, 152 Mich App 756, 761; 394 NW2d 94 (1986). There is no dispute that defendant was armed with a gun. The fact that defendant completed the robbery (he took a bottle of beer at gunpoint without paying the asking price) was

sufficient to prove an intent to rob and steal. *People v Henderson*, 22 Mich App 128, 131; 177 NW2d 254 (1970).

"A simple assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). An attempted-battery assault, one which is sufficiently proximate to the intended victim, demonstrates the defendant's present ability to inflict injury on the victim. In the case of an apprehensive-type assault, however, "actual ability to inflict the threatened harm is largely irrelevant and unnecessary, as long as the victim reasonably apprehends an *imminent* battery." *People v Reeves*, 458 Mich 236, 244; 580 NW2d 433 (1998) (emphasis in original). In other words, "the assault element is satisfied where the circumstances indicate that an assailant, by overt conduct, causes the victim to reasonably believe that he will do what is threatened." *Id.* (footnote omitted).

The evidence showed that defendant entered a store armed with a gun and took a bottle of beer without paying for it in full. Nick Assk, the owner, and Manul Manjo, his cousin, testified that defendant pointed the gun toward them. Although they were separated from defendant by bulletproof glass, Manjo stated that he was afraid and allowed defendant to leave without paying for the beer because he had the gun. The fact that the owners took precautionary measures to prevent or minimize injury does not preclude a reasonable fear of injury in the event of an actual shooting. Therefore, the evidence was sufficient to enable a rational trier of fact to conclude that defendant placed the victims in reasonable fear of an immediate battery.

We find no basis for concluding that the court's verdict was based on reference outside the record. Although the judge made reference to her experience with bulletproof glass in discussing defense counsel's closing argument, there is no indication that she took that into account in deciding the case. Moreover, whether defendant had the actual ability to injure Assk and Manjo was irrelevant because his conduct was sufficient to put them in reasonable fear of injury. *Reeves, supra*.

Defendant next contends that he was denied effective assistance of counsel. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

> To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233; 661 NW2d 553 (2003) (citations omitted).]

Defendant contends that counsel was ineffective for failing to impeach Assk and Manjo with minor discrepancies in their testimony. Whether and how to impeach witnesses is a matter of trial strategy. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it

assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). Given the undisputed testimony that defendant stole a beer from the store while armed with a gun and that he was found only a couple blocks away with both the beer and the gun, it is unlikely that the outcome of the trial would have been different had counsel cross-examined the witnesses about defendant's conduct during an earlier visit to the store or who was working when he committed the crimes.

Affirmed.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello